

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF VIRGINIA  
3 ALEXANDRIA DIVISION

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4 CHARLES SCHWAB & CO., INC., )  
5 Plaintiff, ) Case No. 1:13-cv-949  
6 v. ) Alexandria, Virginia  
7 JOSHUA WINSTON, ) August 6, 2013  
8 Defendant. ) 10:28 a.m.  
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TRANSCRIPT OF HEARING

BEFORE THE HONORABLE CLAUDE M. HILTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Timothy M. McConville, Esq.  
Michael R. Greco, Esq.

For the Defendant: Steven M. Levine, Esq.  
Jonathan C. Thau, Esq.

Court Reporter: Tracy L. Westfall, RPR, CMRS, CCR

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by computer-aided transcription.

1 P R O C E E D I N G S

2 THE CLERK: Civil action 2013-949, *Charles Schwab &*  
3 *Co., Inc. v. Joshua Winston.*

4 MR. MCCONVILLE: Good morning, Your Honor. The  
5 defendant's counsel is outside. Oh, there they are. We're  
6 good.

7 THE COURT: All right.

8 MR. MCCONVILLE: Good morning, Your Honor. My name is  
9 Timothy McConville. I'm with the firm of Odin, Feldman &  
10 Pittleman in Reston. We're here on behalf of Charles Schwab &  
11 Co. in the matter before the Court today.

12 Thank you, Your Honor, for hearing us on an emergency  
13 basis. Very much appreciate the Court making himself available  
14 this morning.

15 I'm joined, on behalf of Charles Schwab & Co., by  
16 Michael Greco. Mr. Greco is a member of the bar in  
17 Pennsylvania. He's admitted to practice before the United  
18 States District Court for the Eastern and Middle Districts of  
19 Pennsylvania as well as the District of Colorado.

20 Your Honor, we've moved for Mr. Greco's admission pro  
21 hac vice. That motion's currently pending before the Court.  
22 With the Court's permission, Mr. Greco will appear this morning  
23 and argue.

24 THE COURT: That motion's granted. If I haven't  
25 entered the order already, I'll do so.

1 MR. MCCONVILLE: Mr. Greco, Your Honor, will argue for  
2 Charles Schwab.

3 MR. LEVINE: Good morning, Your Honor. Steven Levine  
4 from LevineCarita, PLC here in Alexandria. I am counsel for  
5 Defendant Winston. And with me today I have Jonathan Thau who  
6 is a member of the bar of New York, also a member of the United  
7 States District Court for the Southern District of New York, and  
8 a member of the Second Circuit U.S. Court of Appeals.

9 I would like to move the admission of Mr. Thau for the  
10 purpose of this hearing. Our application did not get  
11 electronically filed yesterday, but it will be done as soon as  
12 this hearing is over and I get back to the office.

13 THE COURT: Very well. Your motion is granted as well.

14 MR. LEVINE: Thank you. And I think Mr. Thau does have  
15 a preliminary matter on subject matter jurisdiction if the Court  
16 wants to hear that first?

17 THE COURT: If you want, that will be fine.

18 MR. THAU: Thank you, Your Honor. I appreciate having  
19 the opportunity to be heard. Understanding this is a  
20 preliminary matter, I'll try to confine my remarks to the  
21 subject matter aspect of the case right now, and I hope to have  
22 an opportunity to address any other issues after Mr. Greco has  
23 the opportunity.

24 Your Honor, first of all, this case is heading to  
25 arbitration. Everybody agrees to that. There's an allegation

1 in the complaint that somehow the Court needs to order the  
2 parties to arbitration. My client, Mr. Winston, is what's known  
3 as an associated person, meaning he was an employee of Charles  
4 Schwab, the plaintiff. He does not contest that this matter,  
5 the merits of the case have to go to arbitration.

6 So there's no justiciable issue before this Court. I  
7 don't think Mr. Greco believes that there is. Mr. Greco and I  
8 have dealt with each other in other cases. But just to be  
9 clear. That's not in dispute before this Court.

10 Mr. Winston gave a notice of intended resignation, Your  
11 Honor, on July 22nd. The contract that Schwab has put before  
12 you purports to impose on an employee a four-week notice period  
13 where you have to tell Schwab that you're going to leave and you  
14 have to be prepared for that four-week period to help, if they  
15 want you to, to transition business.

16 Mr. Winston had intended to go to Morgan Stanley,  
17 another securities firm. Mr. Winston agreed to honor the notice  
18 period, gave his notice, agreed to come back to the Schwab  
19 office on several occasions and did. There's some disagreement  
20 between the parties perhaps about what he was asked to do or not  
21 and whether it was appropriate or not, which I'd be happy to  
22 address.

23 But last Friday, Schwab told Mr. Winston -- or actually  
24 told my firm -- he's no longer employed by Schwab. He then  
25 started work at Morgan Stanley, but he had been prepared at all

1 times to continue to honor the notice period. Now, Your Honor,  
2 the complaint in this case purports to predicate jurisdiction on  
3 the following basis, that there is diversity of citizenship and  
4 an amount in controversy in excess of \$75,000, which are the two  
5 prerequisites.

6 There is no doubt Charles Schwab is a California  
7 corporation. Mr. Winston resides and worked for Schwab in  
8 Virginia. There is diversity. But we do fundamentally  
9 question, Your Honor, on this factual record as to how there  
10 could possibly be \$75,000 in controversy.

11 When you read the papers that were submitted yesterday  
12 to the Court, there is not a single allegation, Your Honor, that  
13 even one account has transferred from Charles Schwab to  
14 Mr. Winston's new employer, Morgan Stanley. There has to be  
15 some reasonable quantification under which you can get to the  
16 \$75,000 in controversy. There is no allegation that any  
17 business has been lost. There is no allegation that even a  
18 single account has been transferred.

19 There is case law, as I'm sure Your Honor is aware,  
20 that you may be able to argue that an injunction could have some  
21 monetary efficacy such that an injunction might satisfy the  
22 dollar threshold. But on the factual record before the Court  
23 this morning, there is no such finding. There is no allegation  
24 that an injunction would be worth that. There is no allegation  
25 that any clients are about to leave Schwab to go to Morgan

1 Stanley.

2 At this point on this record where Mr. Winston had been  
3 honoring his notice period until he was told by Schwab we don't  
4 want you here anymore, I do not believe the \$75,000 threshold  
5 has even remotely been satisfied.

6 One of the points I would make, and Schwab in the  
7 papers that were submitted to Your Honor called your attention  
8 to a couple of cases in which Schwab had received injunctive  
9 relief, suggesting that those cases in fact justified an  
10 application for an injunction at this point. In both of those  
11 cases as I read them, the courts issued injunctions several  
12 months after the individual had transitioned to another firm.

13 In both cases, for example, the case that was attached  
14 to the papers, I believe it's called *Aviles*, 20 to 25 accounts  
15 had transferred, and there did not seem to be an issue. An  
16 evidentiary hearing was held, testimony was taken, and there  
17 does not seem to be an issue that in fact there was a live  
18 controversy.

19 The same thing with the other case, I believe it was  
20 called *Karpiak*, that was cited repeatedly in the memorandum of  
21 law. In that case, and I believe Mr. Greco with his prior firm  
22 was involved in that case, in that case also, Your Honor,  
23 accounts had transferred. There was a substantial amount of  
24 assets that had moved, and there was a justifiable or  
25 justiciable controversy.

1           In this case, Your Honor, nothing of the sort is  
2     presented. And as the Court is aware, as a threshold matter,  
3     you do need to determine jurisdiction before you can even get to  
4     the issue of the restraining order. Now, to be clear, this  
5     claim can and -- can be filed before the financial regulatory,  
6     before FINRA, at any time. I'm assuming at some point Mr. Greco  
7     will actually file papers. Again, we consent.

8           But there can't possibly be a jurisdictional basis for  
9     this Court on this record to take any jurisdiction when I don't  
10    think that the threshold has been satisfied on the \$75,000.  
11    Again, the only other allegation about jurisdiction is that the  
12    Federal Arbitration Act be invoked to compel arbitration. But,  
13    Your Honor, there is no dispute. We're prepared to go, and that  
14    can't possibly be the basis for dispute in this courthouse.  
15    We're prepared to stipulate to going to arbitration, and we're  
16    prepared to stipulate to do it today.

17           I'd be happy to address some of the other issues in the  
18    matter, but I wanted to make sure that I address that first  
19    because I do think it is a matter under the case law that must  
20    first be determined by the Court. We would be happy on an  
21    expedited schedule, meaning in the next day or two, to submit a  
22    short set of papers dealing with that issue. One, the legal  
23    basis for the objection that we have; and, two, the factual  
24    basis with regard to the fact that there hasn't been the kind of  
25    activity, there haven't been account transfers or other things,

1 that could get us to the \$75,000 threshold at this point, Your  
2 Honor. Thank you.

3 MR. GRECO: Good morning, Your Honor. Thank you for  
4 the courtesy of permitting me to argue this morning.

5 I'm afraid the defendants misunderstand or misinterpret  
6 28 U.S.C. 1332. The diversity statute doesn't require damages  
7 exceeding \$75,000. The diversity statute requires that the  
8 matter in controversy exceed the sum or value of 75,000.

9 What the plaintiff has alleged is that the value -- the  
10 matter in controversy exceeds the sum or value of 75,000. We  
11 state clearly in the verified petition that Mr. Winston, the  
12 defendant in this case, was assigned a practice to service at  
13 Schwab that had assets in it exceeding a half a billion dollars,  
14 575 -- 575 or 545 -- 545, excuse me, million dollars in assets  
15 that generated hundreds of thousands of dollars in revenues,  
16 annual revenues, for Schwab on an annual basis. That's in our  
17 verified complaint.

18 So I'm afraid the defendants have misunderstood the  
19 diversity statute. We don't actually have to wait until we've  
20 been damaged in order to bring this complaint. In fact, the  
21 Fourth Circuit has specifically said so. That's exactly why an  
22 action for injunctive relief is ripe. The Fourth Circuit in the  
23 *Merrill Lynch v. Bradley* case that we've cited in our memorandum  
24 of law says that even an injunction a few days after  
25 solicitation has begun is too late because customers can't be



1 unsolicited. We are here to prevent the solicitation of  
2 customers. Because, and as it says in the defendant's contract,  
3 he says, I agree that Schwab is entitled to injunctive relief to  
4 prevent threatened solicitation. We said to the defendant, and  
5 it's explained in our papers, when he was in the office his  
6 manager asked him, are you going to solicit clients? And he  
7 said, talk to my lawyer.

8           So I wrote a letter to Mr. Thau and I said, is he going  
9 to solicit clients? Mr. Thau didn't respond. And I sent him an  
10 e-mail and I said, we can avoid going to court. Just answer my  
11 question, please. Is he going to solicit clients? There was no  
12 response to that.

13           So the threatened harm is real and palpable. And as  
14 the Fourth Circuit said in *Merrill Lynch v. Bradley*, even a few  
15 days after the solicitation has begun -- he began at Morgan  
16 Stanley on Friday afternoon -- that's too late. You've got to  
17 have injunctive relief to stop it.

18           28 U.S.C. 1332, you don't have to have damages. The  
19 matter in controversy must exceed the sum or value of 75,000.  
20 So the Court clearly has subject matter jurisdiction.

21           THE COURT: Yeah, but the matter in controversy is not  
22 the total of the account that he had at Schwab. The amount in  
23 controversy is what you will lose if there is solicitation.

24           MR. GRECO: Correct, Your Honor. And what we've said  
25 is that -- what we have pled in the complaint is that the half

1 billion dollars in assets clearly generate in excess of \$75,000  
2 in revenues to Schwab on an annual basis.

3 THE COURT: Well, of course they would, but there's no  
4 allegation that he has taken any of those accounts with him.

5 MR. GRECO: But he's threatening to do so, and that's  
6 what we're here to stop. He's threatening to do so.

7 The matter in controversy is -- and if you look at  
8 exhibits to the complaint, Your Honor --

9 THE COURT: Well, does a threat give me jurisdiction  
10 that there's a controversy here? I mean, he may just be playing  
11 around with you. He may just dislike the fact that you told him  
12 something or whatever.

13 MR. GRECO: But that's what we're here to ask the Court  
14 to stop, Your Honor. If you look at the exhibits to the --

15 THE COURT: What is there to stop if he hasn't done  
16 anything?

17 MR. GRECO: He's threatening to do it. We're here  
18 asking you to stop him from doing it. If you look at the  
19 exhibits to the complaint, the documents that we've alleged that  
20 he's taken, which he will not assure us that -- and if you look  
21 at the exhibits to the complaint, he's listed clients with tens  
22 of millions of dollars in assets and he's threatening to take  
23 that information from us.

24 THE COURT: What did he do to threaten to do that?

25 MR. GRECO: Well, Your Honor --

1 THE COURT: Do you have an exhibit here where he's  
2 threatened that?

3 MR. GRECO: Well, it's detailed in our verified  
4 allegations. If I could proceed to explain to you what happened  
5 and you'll understand the threat in complete, if I can do that?

6 THE COURT: Yeah.

7 MR. GRECO: So allow me to explain what happened.  
8 Mr. Winston is, as you understand now, a former financial  
9 consultant at Schwab. There are two aspects of what we're  
10 seeking here today. One is to enforce his contractual  
11 obligation not to use or disclose our confidential information  
12 and not to solicit.

13 The second aspect, which I do want to get to later  
14 because Mr. Thau did allude to, we agree that this is ultimately  
15 arbitrable. What we would like to ask the Court to do is to  
16 compel us to arbitrate in accordance with the terms of our  
17 arbitration agreement. That's a second issue that we do  
18 ultimately want to get to with the Court.

19 But focusing on the first part of it, Mr. Winston is a  
20 financial consultant. Unlike brokers at other firms who develop  
21 books on their own through cold calling and seminars and so  
22 forth, Mr. Winston was assigned this practice, just given this  
23 practice to service on behalf of Schwab, over a half billion  
24 dollars in assets.

25 His contract says you've got to agree to two things.

1 You have to agree that the information that we give you, names,  
2 addresses, phone numbers, all the account information, that's  
3 confidential. You're not going to use it. You're not going to  
4 disclose -- except for --

5 THE COURT: I think I understand all of that.

6 What I'm having trouble understanding is you've got --  
7 in order to get extraordinary relief, injunctive relief, you've  
8 got to show some kind of irreparable harm.

9 MR. GRECO: Imminent --

10 THE COURT: Now, what has he done that shows there's  
11 imminent irreparable harm? That's what I want to know. The  
12 rest of it I grasp, I think.

13 MR. GRECO: When he gave notice that he was going to  
14 leave, we looked at his computer. During the notice period, his  
15 obligation is to come in and meet with us to review the files.  
16 So we looked around at the different files to take stock of what  
17 needed to be done in transition.

18 We looked on his computer and we found this  
19 spreadsheet, which is exhibit -- I think it's Exhibit K. It's  
20 been redacted. It's a spreadsheet that has -- it was an unusual  
21 spreadsheet. It caught our attention.

22 It has a list of 206 client names, addresses, phone  
23 numbers, what appear to be market values, bank deposits, loans,  
24 average basis points. This is revenues to tell you, you know,  
25 the types of revenues that are generated on the accounts.

1           And what was odd about this spreadsheet, Your Honor,  
2           what we determined was that ultimately the spreadsheet was saved  
3           over and innocuous content was filled in to replace its content.  
4           Okay. And the confidential information was printed and then it  
5           was saved over to conceal this confidential information ever  
6           existed. We had to ferret this out and find out that it was  
7           there.

8           So we called Mr. Winston in and we said, what is this  
9           spreadsheet? And he said, oh, that was just something that I  
10          created for practice management. And the manager said, well,  
11          can you explain to me what information is on here? And he said,  
12          well, those are just account values. The manager said, well,  
13          let's look at -- let's look at Exhibit L. What is this? Do you  
14          agree that you printed this stuff all out? And he said, yeah, I  
15          did print this all out.

16          Where is it? He said, in my desk. She said, it's not  
17          in your desk. Where is it? He said, it's all in my desk. It's  
18          not in your desk. Can you explain to me what's in here? And he  
19          said, well, those are account values. She said, look at Exhibit  
20          L. If you look at Exhibit L, Your Honor, he said, those are  
21          account values. She said, they can't be account values. This  
22          first customer wouldn't have one dollar in your -- in his  
23          account. You service high net worth customers. Nobody has a  
24          dollar in their account. Look at all of these clients who have  
25          similar account values in their accounts. These aren't account

1 values. What is this?

2 And then all of a sudden this gentleman, who is  
3 supposed to be in his notice period helping us transition the  
4 accounts, clams up and says, talk to my attorney, just talk to  
5 my attorney. She said, have you returned everything? And he  
6 said, I'm not going to answer any other questions. Talk to my  
7 attorney. She says, have you returned everything? Do you have  
8 anything in your possession? He said, I'm not going to answer  
9 any other questions. Talk to my attorney. She said, I need to  
10 ask you about some other records.

11 This is his notice period. He's obligated to be  
12 answering questions for us. And there's some more important  
13 points that you need to understand.

14 If you look at Exhibit M to the complaint, these are  
15 just a few examples. We found 480 of these on his computer.  
16 There are some databases that Schwab has called the MARS  
17 database and the client central database.

18 These are databases where you can go to find  
19 proprietary information ranging from account numbers to Social  
20 Security numbers to prospect leads. You want it, it's there,  
21 you name it. And if you look at these print screens, these  
22 screens that we've given you, these are just a sample of 480  
23 that we found.

24 When we looked at his computer, what we found is that  
25 over a span of just a few days in the weeks leading up to his

1 resignation, what did Mr. Winston do? On one day in one  
2 afternoon, he sat at his computer and he hit print screen, you  
3 know, the print screen button on your keyboard, he hit print  
4 screen a hundred and -- I forget the exact number -- 153, 160  
5 times, print screen, print screen, print screen, print screen.  
6 This is a broker who's responsible for servicing clients. He  
7 wasn't working with 160 clients that afternoon.

8           Then the next day he hit another 100-and-something  
9 print screen, print screen, print screen. And Ms. Arwood, the  
10 manager, when sitting down with this broker who's supposed to be  
11 answering questions and helping us figure out the files and  
12 asking him, why did you do this, what was his response? I'm not  
13 going to answer that question. You talk to my attorney.

14           So I wrote a letter to Mr. Thau. I said we believe he  
15 has information. Those letters are attached as Exhibits N  
16 through Q to the complaint. We said we believe he has  
17 information. We want that information returned.

18           And the other thing that Ms. Arwood asked him  
19 reasonably under the circumstances, are you going to comply with  
20 your contract? This looks to us like you made a target list and  
21 you intend to solicit the clients. You've just given me notice  
22 you're going to a competitor. I think it was reasonable for her  
23 to say to this gentleman, do you intend to breach your contract?  
24 Are you going to go solicit? He said, talk to my attorney.

25           So we directed our questions to his attorney like he

1 said. We shouldn't have had to. He was working for us. He was  
2 our employee. But we did. I wrote the letter to Mr. Thau and  
3 said answer, please answer those two questions, return the  
4 information and is he going to solicit?

5 Mr. Thau did not answer those questions. He wrote back  
6 and he complained and he said, you're abusing the notice period.  
7 You're using it to conduct mini depositions. He's our employee,  
8 and we have very reasonable suspicions here that the security of  
9 very highly proprietary information has been compromised. I got  
10 another letter back saying you're abusing the notice period,  
11 conducting mini depositions of our client, even though he, in  
12 good faith, availed himself of the notice period.

13 That, respectfully, Your Honor, is not what happened.  
14 We were using the notice period for exactly what the notice  
15 period is designed to be used for, to transition this practice  
16 and to ensure the security of the information, and all we got  
17 from him was talk to my lawyer. We did talk to his lawyer, and  
18 the lawyer still wouldn't answer the question.

19 I sent then an Exhibit P or Q, I forget which one it  
20 is, to the complaint, another e-mail to Mr. Thau saying let me  
21 be clear -- this was last Thursday -- you have not answered my  
22 two key questions. What we want is return the records and  
23 answer is he going to solicit the clients including by  
24 initiating contact with them. A failure to answer these square  
25 on will result in legal action. Ensure you are ready to appear



1 in the Eastern District of Virginia as early as Monday,  
2 Alexandria Division.

3 Still today, as we stand here right now, no answer to  
4 those questions. So when Your Honor looks -- asks me what's the  
5 threat they're going to do that, that's the threat. There's a  
6 reason they won't answer those questions. He is not returning  
7 the information. This is highly proprietary information. And  
8 he intends, if he hasn't already begun over the weekend,  
9 Mr. Thau said he began employment on Friday night, he's going  
10 to -- he's going to solicit if he didn't begin on Friday night.  
11 I'm not there in his office. I can't be there in his office  
12 when he's on the phone.

13 The transfer process, Your Honor, let me explain to you  
14 how the transfer process works in the securities industry. When  
15 a client wants to transfer their account, they sign an account  
16 transfer form. Mr. Winston will take that form and go to Morgan  
17 Stanley. Morgan Stanley takes what's called an automated  
18 account transfer form, it's an ACAT, they enter it into a  
19 system. It creates a wire. They send a wire to Charles Schwab.  
20 Charles Schwab has to liquidate the assets. It takes seven to  
21 ten days. Mr. Thau knows this. It's the ACAT wire process. It  
22 will take seven to ten days for those wires to go back and forth  
23 for assets to be wired.

24 By that time, this will be a fait accompli. It will  
25 all be done. That's why the Fourth Circuit in *Merrill Lynch v.*

1     Bradley said even a few days late is too late. Customers cannot  
2     be unsolicited. Injunctive relief is required now to stop the  
3     solicitation. We cannot wait for the damage to be done.

4             THE COURT: I don't have any trouble with that. I'm  
5     having trouble finding any evidence that he is soliciting. Once  
6     you have the evidence of solicitation, of course --

7             MR. GRECO: We don't have to wait for him to actually  
8     begin the solicitation. The fact of the matter is is that I  
9     think we have made a prima facie case that he is threatening to  
10    breach his contract.

11            THE COURT: Was that true in the case that you cited to  
12    me from the Fourth Circuit that there was simply a threat that  
13    there might be solicitation?

14            MR. GRECO: No. In the case that I cited you from the  
15    Fourth Circuit, the solicitation had happened, but what the  
16    Fourth Circuit said in that case -- if I can reach for my brief.

17            THE COURT: It's nice to say those things after you've  
18    got something in front of you that there is some wrongdoing  
19    going on, but the trouble I'm having here is that all I have is  
20    a suspicion.

21            MR. GRECO: Well, I think we have more than a  
22    suspicion.

23            THE COURT: -- wrongdoing here. You don't even  
24    know that he -- there isn't any evidence that he has this  
25    information or has taken it with him.

1 MR. GRECO: Your Honor, I think --

2 THE COURT: -- a lot of computer runs, but you don't  
3 have any evidence here that he has taken that information with  
4 him, No. 1. There's no evidence that he's made a call to  
5 transfer any account, to solicit any of the business.

6 MR. GRECO: I think we do, Your Honor. I think we do.  
7 Keep in mind the standards that the Court has to apply. The  
8 standards that the Court has to apply is the likelihood of  
9 success. I don't have an absolute certainty. I think it's  
10 likelihood of success, and the ultimate standard for us to  
11 succeed at trial is going to be what's more likely than not.

12 You have an employee here who has indicated that he's  
13 leaving to go to a competitor. And in the face of that, you  
14 have an employee who --

15 THE COURT: People do leave and go to competitors and  
16 do not solicit --

17 MR. GRECO: You're correct.

18 THE COURT: -- other clients. We don't know which is  
19 going to happen in this case.

20 MR. GRECO: You're correct.

21 THE COURT: We know that your former employee's going  
22 to somebody new, but the thing we don't know is whether or not  
23 he's going to solicit the clients that he had with your company.

24

25 MR. GRECO: Correct. But what we do know is that in

1 the days leading up to that resignation, he engaged in highly  
2 suspicious activities. We do know that he gathered information  
3 that he had no reasonable basis to gather. He had implausible  
4 suggestions as to why he did it. When he was queried about it,  
5 he clammed up and said talk to my attorney. When we talked to  
6 his attorney, his attorney refused to answer those questions,  
7 and still does, and has yet to counter those allegations even  
8 though in having sufficient time to do so.

9 And I think that --

10 THE COURT: Well, I mean, that might be what you're  
11 likely to have happen or the easy thing that happened, but -- I  
12 mean, just the fact that he says he isn't going to answer you,  
13 that doesn't --

14 MR. GRECO: Pardon me?

15 THE COURT: -- that doesn't really get you anywhere  
16 either. There's still no solicitation. There's no use of any  
17 confidential information or evidence of it.

18 MR. GRECO: Well, I think there's evidence of misuse of  
19 the information when he is -- there's no legitimate purpose for  
20 him to have done what he's done and when.

21 THE COURT: That was all done within your company. So  
22 as long as it stays within your company, got no problems.  
23 Right?

24 MR. GRECO: Your Honor, when we asked him for his  
25 assurance that he hasn't taken them, he refuses to answer and he

1 says --

2 THE COURT: That's not -- that doesn't qualify as  
3 something to give an injunction. Just because he doesn't give  
4 you the right answer to a question, you can't come running in  
5 and get an injunction.

6 MR. GRECO: How can we prove an impossibility then? I  
7 think we're invoking --

8 THE COURT: How can I go ahead and damage somebody  
9 else's career based on no evidence? Just because you think he  
10 won't answer your question, so you think he's going to do  
11 something. So I'm going to enter an injunction against him  
12 presuming that he's going to do just what you think he's going  
13 to do?

14 MR. GRECO: Well, I'm not sure -- I think the Court has  
15 now waded into a balancing of the harms. I don't think there  
16 would -- damage his career. We would --

17 THE COURT: I don't see any harm to you yet.

18 MR. GRECO: There would be no harm --

19 THE COURT: I'm not balancing anything. I cannot find  
20 any harm. That's what I've been talking about.

21 Where have you been harmed one iota?

22 MR. GRECO: The taking of this information. I think  
23 we've given you sufficient proof to --

24 THE COURT: No evidence that he's taken it. The only  
25 evidence you have that I see is that he did some things that you

1 think are suspicious that maybe he shouldn't have done. When  
2 you asked him about it, he wouldn't really tell you what he was  
3 doing. Now, we don't know. But there is no evidence that he's  
4 taken that information.

5 I've given you a long time to argue here. I've looked  
6 through these exhibits. I understand what you're saying. I  
7 understand you have a concern. Well, your client has a concern.  
8 But there's no evidence that anything's happened. And without  
9 some showing of irreparable harm, I cannot consider an  
10 injunction, a temporary restraining order or an injunction.  
11 That's just premature.

12 Now, what you say may be true. But now maybe since  
13 this issue has been raised, maybe nothing will ever happen. I  
14 don't know. That would be the best outcome for everybody, I'm  
15 sure. No lawsuit or anything else. You-all go to arbitration  
16 and you won't have to worry about an injunction of any kind.

17 I would say if you had evidence that he is harming you  
18 in any way by the solicitation or the use of your trade secrets  
19 or confidential information, you'd be entitled to injunctive  
20 relief, but I don't find any evidence of that.

21 MR. GRECO: Okay. Your Honor, I understand Your  
22 Honor's view and obviously respect that.

23 What I would then ask for Your Honor is -- I think you  
24 can understand why we have good cause to believe what we  
25 believe, and I would ask for the opportunity to prove it. I

1 think what we need is an opportunity to conduct expedited  
2 discovery in aid of our request for a preliminary injunction  
3 because we did move for, not only a temporary restraining order,  
4 but for a preliminary injunction.

5 We have made extensive argument to Your Honor this  
6 morning as to why we believe the defendant did what he did. And  
7 I think that based on the argument -- and you're right. Your  
8 Honor's been very gracious to me and given me extensive  
9 opportunity to argue as to what he's been doing and what he's  
10 threatened.

11 And if you were to assume that since Friday night he  
12 has been soliciting, for the sake of my argument, if we were to  
13 assume that everything that I've been arguing is true but I just  
14 can't prove it because I haven't been there in his office with  
15 him, I haven't been there at his home where he's got the  
16 documents and he's doing it, the only way I can do that, to  
17 prove it, is through discovery. I need the opportunity to  
18 depose him and to get documents.

19 What I want to point out to Your Honor are some  
20 provisions in the contract. If I could direct the Court's  
21 attention to Exhibit G to our complaint for a moment.

22 THE COURT: All right.

23 MR. GRECO: In Exhibit G to the complaint, again, this  
24 is a promise that was made by the defendant. It's paragraph 12  
25 of the defendant's contract.

1 Defendant agreed that in any action in which Schwab  
2 seeks to enforce the terms of this agreement, the contract that  
3 we've been talking about this morning, and particularly one  
4 seeking injunctive relief, he consents to discovery on an  
5 expedited basis, and that includes both deposition and document  
6 discovery.

7 And we would not overreach in the discovery we seek in  
8 aid of our preliminary injunction. What we would want is an  
9 opportunity to serve five document requests and to depose the  
10 defendant, and then to come back to prove the claims that we've  
11 sought to prove to Your Honor on an expedited basis.

12 I think that that would be absolutely essential under  
13 the Fourth Circuit's decision in *Merrill Lynch v. Bradley*  
14 because --

15 THE COURT: What do you say to expedited discovery  
16 on him?

17 MR. THAU: Your Honor, both sides have told you this  
18 morning that this case belongs in FINRA. FINRA will appoint a  
19 three-person arbitration panel as soon as Mr. Greco submits a  
20 pleading, which apparently, at least as far as I know, he hasn't  
21 done yet.

22 Oh, you did yesterday. Thank you.

23 We haven't seen it yet. So he's already filed a  
24 proceeding with FINRA. FINRA has well-developed rules for the  
25 conducting of discovery, provides for broad document discovery.



1 Does not provide for depositions as a general matter.

2 This case belongs in FINRA. There is no reason why  
3 Mr. Greco and his client should be getting discovery in court  
4 when everybody has told you this morning that the matter is  
5 supposed to be before a three-person arbitration panel.

6 Now, Mr. Greco was certainly free when the panel was  
7 appointed to make a request that although the rules don't  
8 typically provide for depositions, that we think that they be  
9 given in this case. But there's no reason why this case should  
10 be now in this Court.

11 By the way, Your Honor, we started out this morning, I  
12 think there is in fact a very serious issue as to whether the  
13 Court has jurisdiction because we don't think the 75,000 is  
14 satisfied on this front, but we're prepared to work with  
15 Mr. Greco. We have cases with Mr. Greco in other circumstances.  
16 I've got a case with Mr. Greco right now in another state.  
17 There's plenty of opportunity to take discovery according to the  
18 FINRA rules.

19 Asking for depositions now in this Court, which, by the  
20 way, I think there's a question as to whether the Court even has  
21 jurisdiction, that go beyond what FINRA would permit I think is  
22 an attempt to do an end-run around the FINRA rules. So I would  
23 respectfully say, no, there should not be expedited or  
24 non-expedited deposition in this Court. Let's move to FINRA  
25 where it's supposed to be.

1           This case concerns securities industry standards. They  
2           appoint a three-person panel that's presumptively familiar with  
3           standards in the industry, and that's what I think we should be  
4           doing, Your Honor.

5           THE COURT: All right.

6           MR. GRECO: I need to try your patience a little bit  
7           longer. At the beginning this morning when I began, I said  
8           there were going to be two points that we were here before the  
9           Court on. This is the second point.

10           I said we wanted to compel arbitration in accordance  
11           with the terms of our arbitration agreement, and this is that  
12           point. So I need Your Honor to bear with me for two minutes as  
13           I walk the Court through this.

14           THE COURT: Why do I have to get involved that? Aren't  
15           you already there?

16           MR. GRECO: No, because Mr. Thau just walked us into  
17           it, but he walked us into it in an incomplete fashion. I think  
18           it's important for the Court to understand this.

19           He suggested we're on our way to arbitration and the  
20           arbitrators are going to take care of this. What he just said  
21           to the Court was not entirely complete, and I think the Court  
22           needs to understand why the depositions are --

23           THE COURT: Doesn't really -- if you go to arbitration  
24           and you've got the contract that provides for arbitration, and  
25           if he doesn't want to come along, that's his problem.

1           MR. GRECO: I need the depositions now in aid of  
2 preliminary injunction proceedings in front of this Court, which  
3 Your Honor has denied me a temporary restraining order, if I  
4 understand correctly.

5           I've moved for a preliminary injunction as well. So if  
6 I've been denied a temporary restraining order, which I presume  
7 I've been denied without prejudice, because if I go home this  
8 afternoon and somebody rings my phone and says he's soliciting,  
9 I'm assuming I can come --

10          THE COURT: You know, that's exactly right. I mean,  
11 anytime that you have some evidence you can present, you'd be  
12 entitled to come here for a motion for a preliminary -- a  
13 temporary restraining order and then a preliminary injunction,  
14 but it seems to me that I've got to deny this one.

15          MR. GRECO: This TRO.

16          THE COURT: And if you have some evidence later on, you  
17 can always come back. I mean, there's no question about that.

18          But I don't think that it's proper or I should just  
19 simply leave open this motion for a preliminary injunction to  
20 wait and see what happens. I think that this aspect of the case  
21 needs to be dismissed.

22          Obviously, you can come back. I mean, if you have some  
23 evidence at any time that he's soliciting, or whatever you  
24 allege he's doing, you can always come back. But with that part  
25 gone, the only other aspect of this case that's here -- and it

1 is just filed in connection with the preliminary injunction,  
2 isn't it?

3 MR. GRECO: May I explain to the Court why that's not  
4 correct, respectfully, Your Honor? Why this aspect of the case  
5 should not be closed because that would be inconsistent with the  
6 Federal Arbitration Act? May I explain to the Court our  
7 position on that?

8 THE COURT: Well, if you're in arbitration --

9 MR. GRECO: If I could have two minutes just to  
10 explain, Your Honor. There is United States Supreme Court  
11 precedent as to why the direction we are now going in is  
12 inconsistent with our rights and what our position is, and it's  
13 important for me to have the opportunity to explain to Your  
14 Honor why what's about to unfold is not correct.

15 THE COURT: Well, it seems to me you're entitled to two  
16 things: A ruling on your motion for a preliminary injunction.  
17 You're also entitled to arbitration because the contract  
18 provides for it. I denied the temporary restraining order and  
19 therefore your preliminary injunction because there's no  
20 evidence here for either. And you're going to arbitration.  
21 You've already filed for arbitration.

22 MR. GRECO: But I think we're entitled to arbitrate in  
23 accordance with the terms of our agreement. And I'm --

24 THE COURT: That would be determined by the arbiter,  
25 not by me.

1 MR. GRECO: No. I think we're asking for you to compel  
2 us to arbitrate in accordance with the terms of our agreement.  
3 That's what I'm looking for an opportunity to explain to Your  
4 Honor right now.

5 THE COURT: Well --

6 MR. GRECO: That's the motion we filed with the Court.  
7 If you look at it, it's been denominated as a motion for a  
8 temporary restraining order, preliminary injunction, and to  
9 compel arbitration in accordance with the terms of the  
10 agreement. That's what I said from the outset. There was the  
11 second part of this that I wanted to explain to Your Honor this  
12 morning.

13 THE COURT: Well, I have a complaint which is entitled  
14 Verified Complaint for Preliminary Injunctive Relief.

15 MR. GRECO: And if you look at our motion, Your Honor,  
16 it's denominated a motion, not only for a TRO and PI, but also  
17 to compel arbitration in accordance with the terms of the  
18 parties' arbitration agreement.

19 THE COURT: Well, I tell you. You would have to --  
20 you're really going to have to brief that for me --

21 MR. GRECO: It is briefed.

22 THE COURT: -- because I believe that I am not -- I  
23 have never, as yet, set parameters for the arbitrators.

24 MR. GRECO: I'm not looking for you to set parameters  
25 for the arbitrators.

1 THE COURT: Well, then if you're already in  
2 arbitration, what am I to do? Order you to do something you've  
3 already done?

4 MR. GRECO: I'm looking for you to compel arbitration  
5 in accordance with the terms of our agreement. If I could  
6 explain, I would. I'll just explain to Your Honor.

7 What Mr. Thau has said is that FINRA's going to put  
8 together three arbitrators and we'll be on our way. He didn't  
9 tell Your Honor the complete story.

10 What happens with FINRA is that if Your Honor grants a  
11 temporary restraining order of any sort, then we have an  
12 expedited arbitration within 15 days. If Your Honor denies  
13 injunctive relief, we go on the slow track and we don't have an  
14 arbitration hearing for many, many months.

15 When we want to seek temporary or a preliminary  
16 injunction at FINRA, we have to do so in court. That's why I'm  
17 here today. Our only option for seeking temporary or  
18 preliminary injunctive relief is in court. Those are the rules  
19 at FINRA. They tell us I have to come to you to seek that.

20 So under the FAA, if we want to get depositions, the  
21 United States Supreme Court case law says we can modify our  
22 arbitration agreement to seek the right to get depositions.  
23 That's our right under the FAA. The United States Supreme Court  
24 says that courts must enforce arbitration agreements in  
25 accordance with their terms, and that's what we moved the Court

1 for was for an order to compel us to arbitrate in accordance  
2 with their terms.

3 So when Mr. Thau came to the podium and he said, send  
4 us to FINRA, we'll go to FINRA, we'll be happy to go to FINRA,  
5 what he was saying to Your Honor is, yeah, I'll go to FINRA, but  
6 as soon as we leave these doors, I'm going to tell Mr. Greco  
7 there's no way I'm sitting for a deposition.

8 What I'm saying to Your Honor is, okay, send us to --

9 THE COURT: I'm not going to order depositions. I  
10 mean, that I'm not going to get into.

11 MR. GRECO: Well, what I'm asking Your Honor is if you  
12 would at least take under advisement our brief and look at the  
13 case law, because what the case law would tell you is that under  
14 the Federal Arbitration Act, what the Court has to do is two  
15 steps. You look at what the terms of the parties' arbitration  
16 agreement is, determine if there's been an agreement to  
17 arbitrate in a certain manner, and if so, then you compel the  
18 parties to arbitrate in the -- in accordance with the terms of  
19 their agreements.

20 THE COURT: You've already agreed to do that and you're  
21 in arbitration. How else could you arbitrate with that?

22 MR. GRECO: He's not going -- the defendant. I don't  
23 mean --

24 THE COURT: You think he's going to come over and say,  
25 well, we're in arbitration now so we're going to ignore the

1 agreement that we've signed?

2 MR. GRECO: Yes. He's going to go to arbitration, but  
3 he's going to refuse to arbitrate in the manner in which we  
4 agreed to arbitrate. So I'm looking for a court order to compel  
5 him to arbitrate.

6 THE COURT: I would be telling the arbiters how to  
7 conduct their business.

8 MR. GRECO: You would be telling the defendant to sit  
9 for a deposition on his way to arbitration.

10 THE COURT: Your motion for me to compel arbitration on  
11 a particular basis is going to be denied as well. You're in  
12 arbitration. Obviously entitled to go to arbitration, and if  
13 there was a controversy about that, I would order arbitration,  
14 but I wouldn't order it on any conditions. You're going to have  
15 to deal with the arbiters on that. No use in having  
16 arbitrations if we're going to get involved in doing those kinds  
17 of things.

18 MR. GRECO: Pardon me? I didn't hear the last --

19 THE COURT: I said there's no use in having  
20 arbitrations if we're going to get involved in those kinds of  
21 things. We've still got the case. I mean, once it goes to  
22 arbitration, it ought to be out of here. Let the arbiters  
23 handle it.

24 But I think I need to -- I need to dismiss this case.  
25 As I say, if there's any evidence that there is some irreparable



1   harm and there's solicitation, I'll be happy to entertain  
2   another one, but there isn't any evidence here at this point.

3           All right. That takes care of our business for today.  
4   We'll adjourn till tomorrow morning at 9:30.

5           \* \* \*

6           (Proceedings concluded at 11:12 a.m.)

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CERTIFICATION

I certify, this 8th day of August 2013, that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter to the best of my ability.

/s/

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Tracy Westfall, RPR, CMRS, CCR